No. 84-51

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FLAV-O-RICH, INC.,

Petitioner,

v.

NORTH CAROLINA MILK COMMISSION, HERBERT C. HAWTHORNE, VILA M. ROSENFIELD, ANNA G. BUTLER, RUSSELL E. DAVENPORT, CHARLIE L. HARDEE, INEZ M. MYLES, B. F. NESBITT, KATHRYN G. KIRKPATRICK AND DAVID A. SMITH,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

W. C. HARRIS, JR., ESQ.*
F. STEPHEN GLASS, ESQ.*
HARRIS, CHESHIRE, LEAGER & SOUTHERN
Post Office Box 2417
Raleigh, North Carolina 27602
Telephone: (919) 821-1150
Attorneys for the North Carolina Milk Commission, et al.
* *Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

1. Whether the Courts below erred in holding that the state action doctrine, as announced by this Court in *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943) ("*Parker*") and *California Retail Dealers Association* v. *Midcal Aluminum*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980) ("*Midcal*"), exempts the North Carolina Milk Commission from challenge under Section 1 of the Sherman Act, 15 U.S.C. § 1 (1980)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

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Respondents, the North Carolina Milk Commission and its Members ("Commission"), pray that the Petition of Flav-O-Rich, Inc. ("F-O-R") for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-referenced case on April 12, 1984 be denied.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Fourth Circuit was filed on April 12, 1984, No. 83-2066. The opinion and judgment of the United States District Court for the Eastern District of North Carolina were

entered October 27, 1983, No. 82-1172-CIV-5, but are not yet reported. The opinions are reproduced in the Appendix to the F-O-R Petition.

STATUTORY PROVISIONS INVOLVED

The question presented by this case involves the applicability of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1980), to the activities of the Commission, in light of its mandate found in North Carolina General Statutes § 106-266.6 *et seq.*

STATEMENT OF THE CASE

A. Nature Of The Case

This case is not, as F-O-R asserts, about the Commission acting with the purpose of restraining competition in the milk industry through practices of disseminating price and cost information. It is not about the Commission attempting to stabilize wholesale milk prices. Rather, the case is about the Commission's attempt to enforce the mandate of the North Carolina General Assembly ("General Assembly") to prohibit the sale of milk by a giant processor/distributor below cost for the purpose of injuring, harassing or destroying competition.

In 1953, the General Assembly determined that a constantly available uniform and adequate supply of wholesome milk and other milk products is necessary for the citizens of the State. After making additional findings, the General Assembly concluded that it is necessary for the safety, health and welfare of the people that the milk industry be subject to some governmental regulations in order to suppress unfair, unjust and destructive trade practices that were being carried on in the milk industry. The General Assembly further found that the marketing of milk was subject to a great deal of fluctuation in price as

well as to destructive and dangerous practices which result in the destruction of competitors. These and other findings, expressed in the Preamble to S.B. 263, Ch. 1338, 1953 North Carolina Session Laws, led the General Assembly to the passage of the North Carolina Milk Commission Law of 1953.

In rewriting the Milk Commission Law in 1971, the General Assembly made a number of similar findings in the Preamble to S.B. 643, Chapter 779 of the North Carolina Session Laws of 1971, observing that the milk industry is a business affecting the public health and interest, and again found that it is necessary for the safety, health and welfare of the people that the milk industry be subject to some governmental regulations. The General Assembly further found that it is necessary to suppress unfair, unjust and destructive trade practices in the production, marketing and distribution of milk to avoid the creation of hazardous and dangerous conditions with reference to the health and welfare of the people of the State. Specifically, the Assembly pointed to the "unfair and ruinous" competitive practice of selling milk below cost.

With the foregoing considerations in mind, the 1971 General Assembly enacted Article 28(B) of Chapter 106 of the North Carolina General Statutes ("North Carolina Milk Commission Law," hereinafter, "Milk Law"). The preamble to the current[1] as well as the former[2] Milk Law fully articulates the state policy and purpose of the milk regulations.

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[1] Preamble to S.B. 643, Chapter 779 of North Carolina Session Laws, 1971.

[2] Preamble to S.B. 263, Chapter 1338 of North Carolina Session Laws, 1953.

The Milk Law is administered by the Commission pursuant to N.C.G.S. §§ 106-266.6 through 106-266.19 as a part of the North Carolina Department of Commerce (N.C.G.S. § 106-266.7). The Commission is composed of ten members, three of whom are appointed by the Governor; two of whom are appointed by the Lieutenant Governor; two of whom are appointed by the Speaker of the House of Representatives; and three of whom are appointed by the North Carolina Commissioner of Agriculture. *Id.*

The General Assembly has given the Commission the following mandate:

> The Commission shall, subject to the limitations herein contained and the Rules and Regulations of the Commission, enforce the provisions of this Article. . . .
>
> (N.C.G.S. § 106-266.7[i])

The powers of the Commission are stated in the preamble to N.C.G.S. § 106.266.8 which states "*the Commission is hereby declared to be an instrumentality of the State of North Carolina,* vested with power. . . ." (Emphasis added.) Among those enumerated powers are the following: to investigate all matters pertaining to the production, processing, storage, distribution and sale of milk in North Carolina; to supervise and regulate the transportation, storage, distribution, delivery, and sale of milk; to examine the business, books, and accounts of any milk producer, association of producers or distributors; to issue subpoenas to milk producers, associations of producers, and milk distributors, and require them to produce their records, books, and accounts; to subpoena any other person from whom information is desired; to take depositions; to make, adopt and enforce all rules, regulations, and orders necessary to carry out

the purposes of the Milk Law; to hold public hearings and fix prices to be paid producers and/or associations of producers and fix prices for different grades or classes of milk, or fix the maximum and minimum wholesale and retail prices to be charged for milk, and adopt a formula incorporating various enumerated economic factors relevant to the production of milk; to establish prices to be paid producers or associations of producers; and to license distributors and sub-distributors.

Further, the Milk Law permits the Commission to apply to any court of record for injunctive relief in the event of violation of the Article without being compelled to allege or prove that an adequate remedy at law does not exist. The statutes further provide that any person aggrieved by an order of the Commission revoking or suspending a license of a distributor or producer/distributor may have such order reviewed by appeal to the Superior Court. Specifically, N.C.G.S. § 106-266.19 prohibits the sale of milk by any distributor or producer/distributor or retailer below cost for the purpose of injuring, harassing or destroying competition (hereinafter "below cost").

Pursuant to its responsibilities under the Milk Law, the Commission actively investigates and reviews, *inter alia*, complaints of alleged violations of the below-cost sales statute. The investigative and review steps taken by the Commission and its staff with regard to such a complaint are:

(1) The investigation originates with a complaint of a processor/distributor which encounters a price of a competitor which it believes to be below that competitor's cost. The Complaint may be by telephone or in writing, and may be in the form of a letter notifying the Commission that the complainant processor is meeting the

price of a competitor which it believes to be below the competitor's cost and below his cost.

In either situation, the Commission would not commence a below-cost investigation unless the complaining processor first informed the Commission of the price of the competitor which it believed to be below that competitor's cost.

In the case of a school or institutional account, the Commission staff would review the filings of prices bid.

(2) The Commission staff, upon receipt of this information, begins an investigation which may include acquiring information from the retailer regarding the price at which it is purchasing from the named competitor, and/or an examination of the competitor's records to determine if the price at which it is selling to that buyer is, in fact, below that competitor's cost.

(3) At the completion of its investigation, the Commission staff will notify the complainant as to whether the sale complained of was in fact below cost or not and whether the complainant may lawfully meet that cost at the reported price. If the price was not found to be below the competitor's cost, the complainant will be so advised. The price found by the Commission is not revealed to the complainant if different from the price it initially reported.

(4) If the investigation reveals that the price was below cost, the Commission staff may cite the distributor or processor/distributor for a hearing before the Commission to determine if, in fact, a violation of the below cost sales statute has occurred, and if so, the Commission will take appropriate action.

(5) Only prices found to be below cost are contained in the letter citing a processor to appear before the Commission. Prices contained in the citation

letter and which are the subject of the Commission hearing are as F-O-R alleges subject to publication by the media when the violation is prosecuted in a public hearing.

B. Procedural History

In accordance with its previously described authority, the Commission, on 25 May 1982, conducted a hearing pursuant to notice to F-O-R dated 5 February 1982 and 5 May 1982 notifying F-O-R, a licensee of the Commission, to appear and to show cause why its license should not be revoked or why other appropriate action should not be taken for its refusal to make records available to representatives of the Commission as authorized by N.C.G.S. § 106.266.8 during a "below-cost" investigation pursuant to N.C.G.S. § 106-266.19. On 12 October 1982 the Commission made its findings and concluded that on 10 November 1981, 8 December 1981, and 3 May 1982, duly authorized representatives of the Commission requested records of F-O-R as authorized by statute, and that the general manager of F-O-R refused to make such records available to the representatives of the Commission. The Commission then issued an order effective 12 November 1982 suspending the license of F-O-R to distribute milk in North Carolina, but providing that the Commission would accept from F-O-R an offer in compromise of $5,000.00 as a penalty in lieu of such suspension, and upon payment of said sum the Commission would rescind the suspension of F-O-R's license.

F-O-R then brought this action seeking injunctive and declaratory relief. On 5 Nobember 1982, the District Court granted F-O-R's motion for a preliminary injunction. After extensive discovery, both F-O-R and the Commission filed cross-motions for summary judgment. The District Court denied F-O-R's motion and granted

the Commission's motion, from which F-O-R appealed. On appeal, the Court of Appeals affirmed the District Court in an unpublished *per curiam* opinion issued on 12 April 1984, (Petitioner's App. at 1a), referring to the reasoning and conclusions of the District Court.

REASONS FOR DENYING THE WRIT

There are no special or important reasons which would call for the Court to issue a writ of certiorari. The courts below did not err in applying the standards of *Parker*. Supreme Court Rule 17.1(c). Nor is the decision of the Fourth Circuit in conflict with the decisions of the Ninth Circuit "on the same matter." Supreme Court Rule 17.1(a).

I.

The Commissions's Action In Enforcing The State's Statute Prohibiting Sales Below Cost Is Itself Action By The State Which Invokes The State Action Immunity Of *Parker*.

The Commission argued at both stages below that its action in enforcing the state's statute prohibiting sales of milk below cost was the same as the state itself acting thus entitling the Commission to state action immunity. This contention was based upon the status of the challenged activity in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L. Ed. 2d 572 (1975), and *Bates* v. *Arizona State Bar*, 433 U.S. 350, 97 S.Ct. 2691, 53 L. Ed. 2d 810 (1977), *inter alia*. In light of this Court's recent decision in *Hoover* v. *Ronwin*, ___ U.S. ___, 104 S.Ct. ___, 80 L. Ed. 2d. 580 (1984), the Commission renews this contention.

This Court in *Hoover* held that the *Parker* state action antitrust immunity covered a committee of a state supreme court which administered and graded bar exami-

nations. The Court in *Hoover* analyzed the *Parker* decision and its progeny, including *Goldfarb; Bates; Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L. Ed. 2d 1142 (1976); *Lafayette* v. *Louisiana Power and Light Company*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed 2d 364 (1978); and *Midcal*, and concluded that

> When the conduct is that of the sovereign itself, . . . the danger of unauthorized restraint of trade does not arise. Where the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of "clear articulation" and "active supervision."
>
> 80 L.Ed. 2d at 600.

With regard to its action challenged by F-O-R, the Commission was acting as "the state" rather than some independent "political subdivision." *Deak-Perera Hawaii* v. *Department of Transportation*, 553 F. Supp. 976 (D. Hawaii, 1983). See also, *Wainwright* v. *National Dairy Products*, 304 F. Supp. 567, 574 (N.D. Georgia, 1969).

The Commission is legally an instrumentality of the State of North Carolina. It has been expressly declared so by the General Assembly, N.C.G.S. § 106-266.8, and vested with certain enumerated powers including those challenged by F-O-R [the enforcement of the prohibition against sales of milk "below cost," N.C.G.S. § 106-266.19, and the authority to examine records of processors in the course of such investigation, N.C.G.S. § 106-266.8(12)]. See also: *In Re Arcadia Dairy Farms, Inc.* 289 N.C. 456, 464, 223 S.E.2d 323 (1976); *Milk Commission* v. *Galloway*, 249 N.C. 658, 107 S.E.2d 631 (1959); *Milk Commission* v. *Food Stores*, 270 N.C. 323, 154 S.E.2d 548 (1967).

For the purposes of this case, it is manifest that the Commission has been charged with the responsibility of enforcing the state's policy prohibiting the sale of milk

below cost. The Commission, therefore, acts as the state in matters concerning the enforcement of the state's policy. See, *Milk Commission* v. *Galloway*, 249 N.C. at 667-668. The examination of F-O-R's business records is a necessary element in enforcing that policy. The state, through its courts, will provide injunctive relief in the event of a violation of the Milk Law Statutes, or an "order promulgated under the provisions thereof." G.S. § 106-226.13.

The Commission respectfully contends that when the Commission acts to enforce the state's policy, it is the same as the State of North Carolina acting. As in *Hoover*, the actions of the Commission cannot be divorced from the legislature's exercise of its sovereign powers. *Hoover* at 601.

This Court in *Hoover* went on to say that when the activity at issue is not directly that of the state, but is carried out by others pursuant to state authorization, closer analysis is required to ensure that the anticompetitive conduct of the state's representative was contemplated by the state, *Id.* at 599, and the degree to which the state supervises its representative is relevant to that analysis. *Id.* at 600. In the case at bar the lower courts applied the *Midcal* test, correctly concluding that the Commission's challenged activity (below cost enforcement) satisfied both prongs of that test. It is not inconsistent for the Commission to say, especially since *Hoover*, that the Commission's challenged activity is tantamount to activity of the state itself in enforcing the below-cost statute.

II.

The Courts Below Correctly Applied This Court's Decisions Defining The Scope Of The State Action Exemption To The Sherman Act.

This Court's decision in *Parker* is the genesis of any analysis of the state action exemption. In *Parker*, the Court considered the antitrust implications of a California statute that maintained prices and restricted competition among raisin growers through a state commission. This Court, in *Parker*, observed that Congress did not intend to prohibit state action regulating economic activity when it enacted the Sherman Antitrust Act:

> Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. *It is the state which has created the machinery for establishing the prorate program.* Although the organization of a prorate program, approved by the Commission, must also be approved by referendum of producers, *it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy.* The prerequisite approval of the program upon the referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulations and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions. (Emphasis added/,
>
> 317 U.S. at 352, 63 S.Ct. at 314 (citations omitted.)

In the years since *Parker*, this Court has had occasion in several cases to determine the scope of state action immunity. One of those was *Goldfarb*, relied upon at

every stage by F-O-R. *Goldfarb*, holding that the State Bar was not exempt from the Sherman Act in requiring lawyers to adhere to minimum fee schedules is clearly distinguishable from the case *sub judice*.

In *Goldfarb*, the Court focused upon the relationship between the defendant and the state and the activities of the defendant, with emphasis on the extent to which the challenged activity was controlled by state law. The status of the *Goldfarb* defendants differs from that of the Commission. In *Goldfarb*, the defendant was the Virginia State Bar, an independent association consisting of all lawyers admitted to practice in Virginia. The Virginia Supreme Court made the State Bar an agency of the state for "some limited purposes," *Goldfarb*, *supra* at 791, 95 S.Ct. 2004, of regulating the practice of law in that state. The members of the State Bar were not appointed by the Virgina Supreme Court Justices, or by any other state officials, as agents of the state. In contrast, the members of the Commission are appointed by state officials, N.C.G.S. § 106-266.7, and the Commission is declared "to be an instrumentality of the State of North Carolina," vested with certain powers enumerated in N.C.G.S. § 106-226.8.

Another focal point of *Goldfarb* also demonstrates its inapplicability here. In *Goldfarb*, the State Bar enforced minimum fee schedules despite the fact that there was no Virginia statute or Supreme Court rule authorizing the State Bar to maintain such minimum fees. See *Hoover*, note 32 at 606.

Such is not the case here, because as N.C.G.S. §§ 106-266.6 through 106-266.19 explicitly articulate the intention of the legislature to regulate the state's milk industry, and, in particular, to prohibit the sale of milk at below cost.

This Court again dealt with the state action immunity issue in *Bates* v. *Arizona State Bar*, *supra*, which unanimously held that the State Bar of Arizona, enforcing a prohibition of lawyers advertising, was exempt from the Sherman Act. The Court found that the association in *Bates* was enforcing a clear command of the State pursuant to the Airzona Supreme Court rules prohibiting advertising. The Court stated:

> Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the Court; the appellee acts as the agent of the Court under its continuous supervision.
>
> *Id.* at 361, 97 S.Ct. at 2697.

The Commission, in its activities *sub judice*, was likewise enforcing a clear command of the State pursuant to the statute prohibiting sales of milk below cost.

From *Parker* evolved the two-prong test of *Midcal* requiring that before being clothed with state action immunity, a challenged activity must show:

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the state itself.
>
> *Id.* at 105, 100 S.Ct. at 943.

A. The Lower Courts Correctly Held That The Activity Of The Commission At Issue Met The First Part Of The Two-prong *Midcal* Test.

The challenged activity of the Commission resulted from a policy of the state clearly articulated and affirmatively expressed in the Milk Law. The preambles, *supra*, both to the present as well as the former Milk Law, clearly state the purpose of the Milk Law. The General Assembly in enacting the Milk Law articulated

and affirmatively declared the state policy required to achieve that purpose. A summary of the enforcement provisions of the statute is found *supra* at 4, *et seq*. The records examination provision of which F-O-R complains is one of those provisions and is necessary to the enforcement of the below-cost statute.

The North Carolina state courts have quoted from the Preamble to the Milk Law as a statement of state policy. *Milk Commission* v. *Galloway*, 249 N.C. at 664. The North Carolina state courts have also addressed the public policy behind the mandated enforcement measures in *Milk Commission* v. *Food Stores*, 270 N.C. at 335:

> The public interest sought to be protected by G.S 106-226.21 (now embodied in 106-266.19) is the public's interest in the regular flow of an adequate supply of wholesome milk from the producer to the consumer. . . .

Further, in *Milk Commission* v. *Galloway*, the court observed:

> Other facts in the preamble, as well as the Act itself, make it plain that the General Assembly was also concerned with suppressing unfair and destructive trade practices, and with stabilizing the milk industry, so as to enable the producers to secure a fair price for their milk. These recitals in the preamble set the framework for the legislation.
>
> 249 N.C. at 664.

Later at page 666, the court in *Galloway* reviewed the legislative grant of powers to the Commission:

> G.S. 106-266.8(c) gives to the State Milk Commission the specific power to supervise and regulate almost the entire milk industry, including the transportation of milk for consumption. G.S. 106-266.8(j) gives to the Milk Commission express power, after public hearing and investigation, to fix prices to be paid

> producers of milk by distributors, and establishes sufficient standards for its guidance by setting forth in the statute a reasonably clear formula to govern the Milk Commission in determining the reasonableness of the prices to be paid to the producers of milk by the distributors. This leaves to the Milk Commission its proper administrative function. There is a sedulous protection against abuse of power by the Milk Commission provided in G.S. 106-266.17, which requires that when an appeal is taken from an order of the Milk Commission, the proceeding shall be heard *de novo* in the Superior Court. If the Milk Commission should not have the power to regulate and to fix transportation rates for the distributor hauling milk of the producers to the processing plant, as the Trial Court aptly said in its judgment, "the delegation of the power to the Milk Commission to fix prices to be paid producers by distributors would be meaningless, inasmuch as a distributor by unreasonable hauling charges could prevent the producer (sic) from receiving reasonable compensation for his milk." In view of the very broad powers conferred upon the Milk Commission by G.S. 106-266(g) to hold hearings, make and adopt rules and regulations and orders necessary to carry out the purposes of the Act, we hold that the Milk Commision and the Superior Court on appeal, had the power, fairly implied from the language of the Act and essential to putting into effect its declared purposes and objects, to regulate and to fix transportation rates for distributors in North Carolina hauling milk of their producers in North Carolina to their processing plant in North Carolina—all intrastate business—and that sufficient standards for their guidance in regulating and fixing such hauling prices is to be fairly implied from G.S. 106-266.8(j).

Judge Dupree, at 7-8 of the District Court's opinion, observed that "From these grants of power it is clear that the incidental exchange of price information of which plaintiff [F-O-R] complains falls within the affirmatively expressed and articulated state policy."

The District Court at 8 held that a review of the legislative mandate of the Milk Commission discloses that the questioned actions of the Commission "were authorized by the legislature as a clearly articulated and affirmatively expressed policy of the state." The Commission's actions occur, the court found, "as a natural result of the Commission's carrying out the very specific mandate to prevent below-cost pricing and investigate where it occurs."

The Commission contends that since the legislature's intention to regulate the state's milk industry within North Carolina is articulated in the form of a very specific statutory authorization or mandate, the Commission's activity in enforcing the Milk Law is protected by the state action immunity.

F-O-R contends N.C.G.S. § 106-266.8(12) and N.C.G.S. § 106-258 specifically prohibit the disclosure of price and cost information in the course of enforcing the statutory prohibition against sales of milk below cost. This contention is based on an erroneous reading of the two statutes.

With regard to N.C.G.S. § 106-266.8(12), the last sentence of that subsection says, "The Commission may combine such information for any market or markets and make it public." The Commission does, in fact, combine such information with other such information for a given milk market or markets when publishing its reports (e.g., *Updated Summary of Costs of Processing, Distributing and Selling Milk in North Carolina*, a periodic report). To argue as F-O-R does that this statute mandates that the Commission combine the information regarding the below-cost violation obtained in records examination with information from any market is sheer folly. It would be impossible to prosecute any below-cost violation if

combining information were required for that purpose. Neither the Commission nor the accused processor would know whether a violation of the below-cost statute occurred if the evidence were so combined. Certainly, the accused processor would raise a due process question if it could not ascertain the specifics of the allegation against it.

F-O-R's contention regarding N.C.G.S. § 106-258 is incredible, and mirrors the absence of merit in its argument. It is as if F-O-R does not expect this Court to examine the statute. N.C.G.S. § 106-258 is part of Article 27, Chapter 106 of the General Statutes of North Carolina, which pertains to the State *Department of Agriculture* and the *Commissioner of Agriculture*. The Milk Commission is part of the North Carolina Department of *Commerce*, N.C.G.S. § 106-266.7(a), not the Department of Agriculture.

The presentation of N.C.G.S. § 106-258 on page 10 of the F-O-R petition is a distortion of the truth, and casts a shadow on the F-O-R argument based thereon.

Further, F-O-R would have this Court believe that it proved and the District Court found that price information has been repeatedly and continuously exchanged and that the exchange was "unlimited." The truth, however, is found on pages 8-9 of the District Court's opinion where the court discussed five areas in which price and cost exchanges occurred. The court, there, found that "each instance, however, was a natural consequence of the Commission carrying out explicit powers." Memorandum of Decision at 8. Speaking to the second example of an exchange (public hearings[3]), the court said, "That the

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[3] In the course of enforcing the below-cost statute, accused violators are prosecuted. The accused processor has certain Con-

information is in some sense 'exchanged' is only incidental to the procedure employed by the state to investigate below-cost pricing." *Id.*

At page 10, the District Court concludes that the "exchanges occur as a natural result of the Commission's carrying out the very specific mandate to prevent below-cost pricing and investigate where it occurs." The Commission contends that the judgment of the lower courts should be affirmed as its actions were, as Judge Dupree found, "authorized by the legislature as a clearly articulated and affirmatively expressed policy of the state." *Id.* at 10.

B. The Lower Courts Correctly Held That The Activity At Issue In This Action Met The Second Part Of The Two-prong *Midcal* Test.

The reason the lower courts analyzed the second prong of the *Midcal* test only briefly is that the Commission's compliance is so clear.

The "active supervision" of the Milk Law by the state is the very reason F-O-R sought injunctive relief. Since the Commission is a state agency or instrumentality whose very composition is periodically subject to review in the General Assembly and in the appointment process,

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stitutional due process rights at a Commission hearing, among them the right of confrontation and the right to a public hearing. As an incident to such prosecution, the price/cost information must be presented in order for the Commission to make a decision and to comply with the accused processor's constitutional due process rights. The Appellant's twisting of Judge Dupree's use of the term "incidental," Memorandum of Decision, at 6, must be seen in this light. Certainly, the legislature contemplated that a processor accused of violating the below-cost statute would be accorded these constitutional rights during the prosecution of such an alleged violation.

N.C.G.S. § 106-266.7, and its actions are subject to judicial review *de novo*, N.C.G.S. § 106-266.15, it is abundantly clear that the actions of the Commission are subjected to "pointed re-examination" by the state. One could hardly imagine how the *Midcal* analysis could fail to be satisfied in the case *sub judice* in that the state is merely acting through its instrumentality, the Commission, which actively supervises the state's clearly articulated and affirmatively expressed policy of prohibiting violations of N.C.G.S. § 106-266.19 (below-cost sales).

If F-O-R were correct in its literal contention that *Midcal* specifically requires the state's policy to be "actively supervised by the state itself," then only the Legislature (or Supreme Court, or Governor) would be accorded state action immunity. Of course, that has neither been the holding nor result of any case cited by F-O-R or any case known to the Respondents.

In addressing the state's involvement in *Midcal*, this Court turned to *Parker*, noting that the *Parker* Court emphasized that inasmuch as the State Agricultural Prorate Advisory Commission, which was appointed by the Governor, had to approve cooperative policies following public hearings: "*It is the state which has created the machinery for establishing the prorate program. . . . [I]t is the state, acting through the Commission, which adopts the program and enforces it. . . .*" (Emphasis added.). 445 U.S. at 942, quoting 317 U.S. at 352.

F-O-R's contention would thus deny the state action immunity to the facts in Parker since it was a state commission there whose activity was challenged.

F-O-R relies upon *Goldfarb* at page 17 of its Petition to argue that the Respondents have failed to satisfy the second prong of the *Midcal* test. As previously argued in

this brief, the facts of *Goldfarb* are distinguishable from the case at bar on both prongs of the *Midcal* test and lead to a different result. However, the rule announced in *Goldfarb* is sound: in order for state action immunity to apply, the challenged activities "must be compelled by direction of the State acting as a sovereign." 445 U.S. at 105 quoting 421 U.S. at 791. While *Goldfarb* did not satisfy this requirement, in the case *sub judice* the Commission's activity (below-cost enforcement) is compelled by the state in N.C.G.S. § 106-266.19.

At page 16, F-O-R argues that "*at least* half" (emphasis added) of the Commission members come from various sectors of the milk industry, attempting to show a "lack of independence." In fact, *exactly* half of the members (five of ten) come from various sectors of the milk industry, but that fact does not justify the conclusions espoused by F-O-R on page 18. There is no finding of fact by either court below that the Commission members act "individually and in conjunction with other private parties [sic] industry representatives." *Id.* Nor was there any finding of fact by either court which would support the F-O-R conclusion that "The acts complained of in this case are . . . the acts of financially interested individuals." *Id.*

The distinctions between this case and those cases mentioned by F-O-R on page 19 can easily be seen in the light of the language of *Parker:* in none of the cases therein cited by F-O-R did the state "create the machinery for establishing" the program or activity, and act to adopt the program or to enforce it with penal sanctions, in the execution of a governmental policy. 317 U.S. at 352. In *Midcal*, the State simply authorized price filing and enforced the prices set by private parties. 445 U.S. at 105. In *City of Lafayette*, the activity was that of the city, and the Supreme Court affirmed the Court of Appeals'

holding that further inquiry should be made to determine whether the city's actions were directed by the state. In *Cantor*, the state agency passively accepted a public utility's tariff. In *Community Communications, Inc.* v. *City of Boulder, Colo.*, 445 U.S. 40, 102 S.Ct. 835, 70 L. Ed.2d 810 (1982), the court held that the first prong of *Midcal* was not met so the city's moratorium against cable service installation did not qualify for state action immunity.

Much in contrast with the aforementioned cases, cited by F-O-R on page 19, in the case *sub judice* the state did create the machinery for enforcing the prohibition against below-cost sales of milk, and it is the state, "acting through the Commission," 317 U.S. at 352, which enforces it with penal sanctions in the execution of a governmental policy.

III

The Fourth Circuit's Application Of The Midcal Test Does Not Conflict With Holdings Of Other Courts Of Appeal.

A. The Fourth And Ninth Circuits Have No Conflict In Their Interpretation Of The First Prong Of The *Midcal* Test.

It is inconceivable that the Fourth Circuit's holding in this case could conflict with the Ninth Circuit's interpretation of the first prong of the *Midcal* test, as F-O-R asserts. F-O-R's reliance on the Ninth Circuit's holdings in *Knudsen Corporation* v. *Nevada State Dairy Commission*, 676 F.2d. 374 (9 Cir. 1982) and *United States* v. *Title Insurance Rating Bureau of Arizona, Inc.*, 700 F.2d 1247 (9 Cir. 1983) is ill-placed.

Knudsen does not espouse a "strict" construction of *Midcal's* first prong; nor for that matter does the Fourth Circuit in this case set forth a "liberal" or "expansive" interpretation as F-O-R argues. The reason that the Fourth Circuit in this case has no conflict with the Ninth

Circuit in *Knudsen* is that the Ninth Circuit *made no holding at all* in *Knudsen based on the first prong of Midcal.*

The Ninth Circuit in *Knudsen* reviewed the Nevada laws on milk pricing, which required distributors to file lists of wholesale, retail, and distributor or dock prices; sales could not be made below the list price or below cost; importantly, distributor prices did not become effective until seven days after filing, and wholesale price filings were made available to the public. While *Knudsen* dealt primarily with another issue, the court noted on the last page of its opinion that the Nevada Commission argued that there was a cleary stated and articulated state policy to stabilize dairy prices; however, the court there said "but this point may be unimportant in view of the absence of active supervision by the state." 676 F. 2d at 379. The court then pointed out that the Commission simply enforced privately set prices through the mechanism of advance filings. *Id.* Thus, *Knudsen* made a holding only as to *Midcal's* second prong, and not as to *Midcal's* first prong.

In *Title Insurance*, the court found language in the relevant portion of the Arizona statute which reflected "neutrality by the Arizona legislature to competition and uniform rates, not 'a clearly articulated and affirmatively expressed state policy.' " 700 F. 2d at 1253. The court then said:

> Importantly, the state does not require uniform rates; it allows a title insurer to file independent rates separately, to file ndependent rates through a rating bureau, or to deviate from rates filed by a rating bureau on its behalf.

Id.

There is no conflict between the Fourth and Ninth Circuits in the application of *Midcal*. There is merely a difference in facts found in the *Knudsen* and *Title Insurance* cases and the present case. The characterization of the Fourth Circuit's holding as liberal is as hollow as F-O-R's assertion that *Knudsen* stands for a strict interpretation of *Midcal's* first prong. There is no indication by either Circuit that to the same set of facts the *Midcal* first prong would be applied other than in complete harmony. There is no inconsistency of application or result as F-O-R argues; there is only the barren assertion of F-O-R that it is so.

B. The Fourth Circuit's Decision In This Action Does Not Conflict With The Ninth Circuit's View Of The Second Prong Of The *Midcal* Test.

Again, F-O-R fabricates a conflict between the Fourth and Ninth Circuits in their applications of the "state supervision" second prong of *Midcal*. Once again, F-O-R calls for active supervision by the state to be by the state itself. This reasoning must fail, because as previously pointed out in Respondent's brief, under F-O-R's reasoning state action immunity would not even apply to the state commission which was acting in *Parker*.

Miller v. *Oregon Liquor Control Commission*, 688 F.2d 1222 (1982) and *Knudsen* are cases where the Ninth Circuit correctly found insufficient state supervision to satisfy the second prong of the *Midcal* test. In *Miller*, the Ninth Circuit found that Oregon mandated the posting of prices by wholesalers, but did not in any way review the reasonableness of the prices set; the commission merely authorized and enforced the disputed prices. The court pointed out that while the commission " 'may reject any price posting which is in violation of its rules,' (citation) the effect of that rule is simply to effectuate the price

posting and prohibitions on discounts and transportation allowances." 688 F.2d at 1227.

Likewise, *Knudsen* (discussed above) involved another situation where the commission did not set wholesale prices but simply enforced privately set prices through the mechanism of advance filing.

There is no reason to believe that, faced with the same factual situation, the Fourth Circuit would not arrive at the same result in its application of *Midcal's* second prong. Clearly, F-O-R has the burden to show otherwise.

The factual distinctions between *Miller* and *Knudsen* and this case are so clear that a further discussion of *Midcal's* second prong as it relates to this case will not be undertaken.

The Sixth Circuit's *Gambrel* v. *Kentucky Board of Dentistry* 689 F.2d 612 (6 Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1198 (1983) is improperly argued by F-O-R, as to do so is outside Supreme Court Rule 17.1 (a). Nonetheless, it should be noted that the facts in *Gambrel* are dissimilar to *Miller* and *Knudsen*, but are similar to the case *sub judice* in that the state board in *Gambrel* had expressly conferred upon it by statute the powers of enforcement, and, as here, that court found that the enforcement of the statute by the board was one of the compelling reasons for the commencement of that action.

As with the first prong of *Midcal*, there is only the barren assertion by F-O-R of a conflict between the Fourth and Ninth Circuits. There is no liberal or conservative interpretive difference between the two circuits on similar facts, only dissimilar results based on dissimilar facts. Only F-O-R's interpretative distortions of the matters at issue have been liberal.

CONCLUSION

There is neither error in the lower court's decisions in this case nor conflict between the Fourth and Ninth Circuit's decisions relative to the issue in this case. Therefore, F-O-R has failed to satisfy the conditions of Supreme Court Rule 17, and its petition should be denied.

Respectfully submitted,

HARRIS, CHESHIRE, LEAGER & SOUTHERN
W. C. HARRIS, JR., ESQ.*
F. STEPHEN GLASS, ESQ.*
Post Office Box 2417
Raleigh, North Carolina 27602
Telephone: (919) 821-1150
Counsel for Respondents North Carolina Milk Commission, et al.